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No. 98-630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ERIK J. HAMILTON,

Petitioner,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit correctly hold that, in a federal district court action to compel arbitration pursuant to 9 U.S.C. § 4, subject matter jurisdiction under 28 U.S.C. § 1332 exists where there is complete diversity between the parties and the amount in controversy is not contested?

2. Federal arbitration law preempts state law on the validity and enforceability of an arbitration agreement unless the state law applies to "the revocation of *any* contract," 9 U.S.C. § 2 (emphasis added). Did the Second Circuit correctly hold that if New Jersey's Franchise Practices Act invalidated the forum-selection clause of the parties' arbitration agreement, it would be preempted by Section 2?

STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. has no parent company and no subsidiaries (other than wholly-owned subsidiaries).

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STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides, in relevant part:

> A party aggrieved by the alleged failure neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

STATEMENT OF THE CASE

This is one in a series of appeals to the United States Court of Appeals for the Second Circuit and this Court by certain Subway sandwich shop franchisees seeking to avoid their

contractual obligation to arbitrate their claims against Doctor's Associates, Inc. ("DAI"), the Subway franchisor.[1]

In June 1995, the petitioner here, Erik J. Hamilton, executed a standard franchise agreement with DAI to operate a Subway store in the State of New Jersey. The franchise agreement contains a standard American Arbitration Association ("AAA") arbitration clause, requiring arbitration in Bridgeport, Connecticut, on the demand of either party, of all "disputes arising out of or relating to" the franchise agreement.[2] *See*

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1. Since 1995, petitioner's counsel, representing various Subway franchisees, has unsuccessfully appealed 9 times to the Second Circuit raising numerous reasons why the franchisees he represents should not be required to arbitrate their disputes with DAI. Each time counsel has sought *certiorari*, this Court has denied it. *See, e.g.*, *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998) (the instant case); *Doctor's Associates, Inc. v. Neal*, Nos. 96-7722, 97-7582 (2d Cir. Feb. 5, 1998); *Doctor's Associates, Inc. v. Riggs*, No. 97-7529 (2d Cir. Feb. 5, 1998); *Doctor's Associates, Inc. v. Hollingsworth*, No. 96-9599 (2d Cir. Feb. 5, 1998); *Doctor's Associates, Inc. v. Riggs*, No. 96-9141 (2d Cir. June 10, 1997), *cert. denied*, 118 S. Ct. 365 (1997); *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126 (2d Cir.), *cert. denied*, 118 S. Ct. 365 (1997) ("*Distajo II*"); *Doctor's Associates, Inc. v. Jabush*, 89 F.3d 109 (2d Cir. 1996); *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975 (2d Cir. 1996); *Doctor's Associates, Inc. v. Distajo*, 66 F.3d 438 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1352 (1996) ("*Distajo I*").

2. The arbitration clause provides as follows:

> Any dispute or claim arising out of or relating to this Agreement not settled by the parties . . . in accordance with the terms of this Agreement is to be submitted directly to arbitration, shall be settled in accordance with the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held at Bridgeport, Connecticut. Judgment upon an award rendered

(Cont'd)

generally, *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

Mr. Hamilton operated his franchise for over a year at a net financial loss. In late 1996, he informed DAI that he believed that his losses were caused by DAI agents whom he believed had fraudulently induced him to enter into his franchise agreement. In light of this dispute, on December 26, 1996, DAI filed with the AAA a demand for arbitration in Bridgeport, seeking "a declaratory judgment that it had not committed fraud and that 'any failure of Hamilton's business and loss of money was entirely Hamilton's responsibility.' " *Hamilton*, 150 F.3d at 159 (brackets omitted). On January 22, 1997, Mr. Hamilton sued DAI and two affiliated individuals in New Jersey Superior Court where he alleged fraudulent inducement of the franchise agreement and violations of the New Jersey Franchise Practices Act. *Id.*

District of Connecticut Action. Shortly after Mr. Hamilton filed his lawsuit, DAI filed in the United States District Court for the District of Connecticut a petition, under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, to compel arbitration of his claims and a motion to enjoin prosecution of the New Jersey lawsuit pending the arbitration. Because a petition to compel under Section 4 may be brought only in the federal district with jurisdiction over the

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(Cont'd)

> by the Arbitrator may be entered in any court having jurisdiction. The commencement of . . . arbitration proceedings by an aggrieved party to settle any such dispute or claim is a condition precedent to the commencement of legal action by either party, except as specifically provided in this Agreement.

Hamilton, 150 F.3d at 159.

contractually designated site of arbitration and because Mr. Hamilton's franchise agreement with DAI calls for arbitration in Bridgeport, the District of Connecticut was the only forum where DAI could properly file its petition. *See, e.g., Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A.*, 759 F.2d 1027, 1031 (2d Cir. 1985).

Mr. Hamilton opposed DAI's petition and asserted three defenses: (1) because DAI had the right under section 10(d) of the franchise agreement to cap Mr. Hamilton's damages at $50,000, the amount in controversy was insufficient to confer subject matter under 28 U.S.C. § 1332; (2) the arbitration clause's choice of Bridgeport as the forum for arbitration could not be enforced under New Jersey law, the law petitioner argued applied to the franchise agreement, or Florida law, the law specified in the franchise agreement; and (3) the arbitration clause was unconscionable under either New Jersey law or Florida law because it requires Mr. Hamilton to pay half the expenses of arbitration. Significantly, petitioner did not raise one of the defenses that he now asserts as a ground for *certiorari* — that diversity in the Connecticut federal court suit should be determined by reference to the parties in the New Jersey state court rather than the parties before the District Court. Also significantly, petitioner did not question the validity of the arbitration clause and did not argue that DAI or its agents fraudulently induced him to enter into the arbitration clause in the franchise agreement.

Chief Judge Peter C. Dorsey of the Connecticut District Court rejected each of petitioner's defenses and granted DAI's petition to compel arbitration and motion to enjoin Mr. Hamilton from prosecuting the case pending in New Jersey.[3]

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3. Initially, the District Court denied without prejudice to renew DAI's petition to compel and DAI's injunction motion, in the mistaken (Cont'd)

Petitioner's Supplemental Appendix ("Pet. Supp. App.") 31a-32a. Petitioner then appealed to the United States Court of Appeals for the Second Circuit. Petitioner cited four grounds for appeal, two of which are relevant here.

Jurisdiction Argument. Petitioner first argued that

> the district court erred in compelling arbitration "because 9 U.S.C. § 4 does not provide a federal statutory cause of action to determine the arbitrability of damage claims pending in a previously filed, non-removable[] state case."

Hamilton, 150 F.3d at 161. The Second Circuit noted that petitioner's argument was identical to one that petitioner's counsel had previously raised and lost before the Second Circuit in *Distajo I*, 66 F.3d 438, and to which this Court denied *certiorari* in *Distajo I*, 116 S. Ct. 1352. Relying on *Distajo I*, the Second Circuit held that "the district court had diversity jurisdiction over this action" and that "Hamilton's jurisdictional challenges are without merit." *Hamilton*, 150 F.3d at 161.

Preemption Argument. Petitioner also argued that "the district court erred by failing to apply New Jersey law to

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(Cont'd)
belief that Mr. Hamilton had asserted fraudulent inducement of the franchise agreement arbitration clause. If petitioner had made such a claim, Chief Judge Dorsey would have been correct that this was something for the federal District Court and not an arbitrator to decide. *See Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 404 (1967). On June 11, 1997 and on August 1, 1997, DAI filed supplemental briefs, explaining that in the New Jersey action Mr. Hamilton had not alleged fraudulent inducement of the arbitration clause, but rather had only asserted fraud with respect to the entire franchise agreement. The District Court agreed with DAI, and in a September 18, 1997 order granted DAI's petition and motion.

determine the enforceability . . . of the forum selection clause." *Hamilton*, 150 F.3d at 161. Petitioner contended, as he does in his *certiorari* petition, that under New Jersey's franchise law, a forum-selection clause in a franchise agreement that requires arbitration outside the state is void as against public policy and unenforceable. *Id.* at 161-62, *citing Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996).[4] Without deciding whether New Jersey franchise law did, in fact, apply to arbitration agreements, the Second Circuit rejected petitioner's claim because "to the extent that [New Jersey's law] can be read to invalidate arbitral forum selection clauses in franchise agreements," Section 2 of the FAA preempts it. *Id.* at 163.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for two reasons. First, the Second Circuit correctly applied well-established rules to the particular facts of this case.

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4. Petitioner's *certiorari* papers might also be read to raise a choice of law issue. However, the Second Circuit concluded that Mr. Hamilton had waived any choice of law argument:

> Hamilton, however, argues that the district court failed to consult New Jersey law in deciding whether the arbitration clause was unconscionable. . . . Without reaching the merits of Hamilton's contention, we conclude that he has waived this argument. He failed to bring New Jersey law on unconscionably to the attention of the district court or to argue that section 2 of the Act preserved general principles of state law as rules of decision. Even on appeal, Hamilton cites no New Jersey law undermining the conclusion reached in *Stuart*, nor does he make any argument that New Jersey's standard regarding unconscionably is in any material respect different from the law applied in *Stuart*.

Hamilton, 150 F.3d at 163-64, *citing Stuart*, 85 F.3d 975. Because Mr. Hamilton does not challenge the Second Circuit's waiver holding, no choice of law issue remains in the case.

A. Petitioner's jurisdiction argument, which the Second Circuit rejected in 1995 and to which this court denied *certiorari* in 1996, is contrary to the language of Section 4 of the FAA, fundamentally at odds with this Court's decision in *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and would completely undermine the efficacy of the FAA.

B. Likewise, petitioner's preemption argument offends the clear and broad preemption language of Section 2 of the FAA and this Court's commensurately broad interpretations of that language in *Casarotto*, *Perry*, *Southland* and *Volt*. A more fundamental problem with petitioner's argument, however, is that this Court can reach petitioner's preemption argument only if it assumes that a New Jersey court would invalidate the arbitral forum-selection clause in the parties' franchise agreement. Because the New Jersey courts have not ruled on this issue, at best, this Court would have to hypothesize that New Jersey law prohibits such clauses. At worst, and more likely, petitioner has asked this Court to assume a rule of law that the New Jersey courts are unlikely to adopt.

Second, the Second Circuit's fact-specific decision does not conflict with decisions of this Court or the lower courts and has importance only to the parties. Therefore, it does not present any issue of public importance.

I.

THE SECOND CIRCUIT CORRECTLY APPLIED WELL-ESTABLISHED RULES TO THE PARTICULAR FACTS OF THIS CASE

A. Petitioner's Jurisdiction Argument

The federal diversity jurisdiction statute, 28 U.S.C. § 1332, permits a court to assert diversity jurisdiction where: (1) the amount in controversy exceeds $75,000; and (2) the matter in controversy is between citizens of different states. Petitioner does not dispute the Second Circuit's finding that the amount in controversy exceeds $75,000. *Hamilton*, 150 F.3d at 161. Furthermore, he does not dispute that there is complete diversity between the parties to DAI's District Court Section 4 petition and does not contest the Second Circuit's ruling that the other parties to the New Jersey state court action — who are not parties to the arbitration agreement — are not "indispensable" parties under Rule 19 of the Federal Rules of Civil Procedure. *See id.* Instead, petitioner argues that under Section 4 of the FAA it is the citizenship of the parties to the related state court action, and not the citizenship of the parties to the federal action, that determines subject matter jurisdiction over a petition to compel arbitration.

As the Second Circuit concluded in 1995, petitioner's argument is contrary to the plain language of Section 4 and is without precedent. *Distajo I*, 66 F.3d at 445; *accord Snap-On Tools Corporation v. Mason*, 18 F.3d 1261, 1266-67 (5th Cir. 1994); *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 988 (5th Cir. 1992); *Gibraltar, P.R., Inc. v. Otoki Group, Inc.*, 104 F.3d 616, 618 (4th Cir. 1997). Writing for the Second Circuit, Judge José A. Cabranes held that "[t]he 'parties' to which § 4 of the FAA refers are the parties to the petition to compel."

Distajo I, 66 F.3d at 445-46. Section 4 expressly states that the court must have "jurisdiction under Title 28," thereby incorporating the usual rules for determining diversity jurisdiction under Section 1332. 9 U.S.C. § 4. "As with any federal action, diversity of citizenship is determined by reference to the parties named in the proceeding before the district court." *Distajo I*, 66 F.3d at 445.

According to petitioner, the Second Circuit's straightforward, plain language interpretation of Section 4 would impermissibly allow a petitioner under Section 4 to "accomplish something prohibited by 9 U.S.C. § 3 — the use of one court to stay damage claims pending in another court." Petition ("Pet.") 11. This argument is meritless. Section 3 does not "prohibit" one court from staying an action in another court pending arbitration. Only "the court in which [an arbitrable] suit is pending" can hear a petition under Section 3. 9 U.S.C. § 3. On the other hand, only an "United States district court" that "would have jurisdiction under Title 28 for an order directing . . . arbitration" can hear a petition under Section 4. 9 U.S.C. § 4. Sections 3 and 4 serve different purposes, are entirely compatible, and DAI properly invoked the latter. Petitioner has not identified any language in the text of the FAA or its legislative history that even remotely suggests that Congress intended that diversity of citizenship in a Section 4 action should be determined by the citizenship of parties to a separate state court action.

In addition, petitioner's assertion squarely conflicts with this Court's decision in *Moses H. Cone*, *supra*, which held that

> under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

Moses H. Cone, 460 U.S. at 20, *cited in Distajo I*, 66 F.3d at 446. If petitioner were correct, *Moses H. Cone* would never have been decided since, as here, that case — a Section 4 action in federal court — originally arose out of a parallel state court litigation involving non-diverse parties. *Moses H. Cone*, 460 U.S. at 7 n.4.

Finally, the flaws in petitioner's position are also underscored by the practical effect that his interpretation of Section 4 would have on the ability of parties to compel arbitration under the FAA. If petitioner were correct, a corporation doing business nationwide rarely would be able to bring an action in federal court to compel arbitration with a diverse party. If a federal court were required to determine diversity according to the parties sued in a state court case, the District Court, as a practical matter, could never exercise jurisdiction over a Section 4 petition, because "a party resisting arbitration could defeat federal jurisdiction simply by suing someone from the same state, plus the party seeking to compel arbitration, in a separate state lawsuit." *Distajo I*, 66 F.3d at 445. Petitioner's interpretation would thus eviscerate the rights granted by Section 4, because the statute, on its face, provides that petitions to compel can only be brought in federal court, and only in the district where the arbitration will occur. *Distajo I*, 66 F.3d at 445-46; *see also Snyder v. Smith*, 736 F.2d 409, 420 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Aaacon Auto Transport, Inc. v. Ninfo*, 490 F.2d 83, 84 (2d Cir. 1974); *National Iranian Oil Co. v. Ashland Oil, Inc.*, 641 F. Supp. 211, 213 (S.D. Miss. 1986), *aff'd*, 817 F.2d 326 (5th Cir. 1987), *cert. denied*, 484 U.S. 943 (1987).

B. Petitioner's Preemption Argument

1. *Petitioner asks this Court to hypothesize a new rule of New Jersey law.*

This Court could only reach petitioner's second ground for *certiorari* — that the Second Circuit erred in finding that Section 2 of the FAA preempts New Jersey franchise law "to the extent that [it] can be read to invalidate arbitral forum selection clauses in franchise agreements" — if it assumed that the arbitral forum selection clause in the parties' franchise agreement would indeed be invalid under New Jersey franchise law. *Hamilton*, 150 F.3d at 163. This is a valid assumption, petitioner argues, based on the Supreme Court of New Jersey's ruling in *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996).

Kubis, however, stands for the principle that *judicial* forum-selection clauses in franchise agreements are presumptively invalid. As the District Court below recognized, the *Kubis* court never held or even indicated whether this principle would be extended to the *arbitral* forum-selection context. Pet. Supp. App. 22a-24a. At best, therefore, petitioner asks this Court to hypothesize that the Supreme Court of New Jersey would, if faced with the franchise agreement here, extend the rule of *Kubis* into the arbitration context.

At worst — and more likely — petitioner asks this Court to hypothesize a New Jersey rule of law that the Supreme Court of New Jersey would not, and will never, adopt. The *Kubis* court found that in enacting the Franchise Practices Act ("FPA") the New Jersey legislature had intended to "protect[] franchisees from the superior bargaining power of franchisors and provide[] *swift and effective judicial relief* against franchisors that violate the [FPA]." *Kubis*, 680 A.2d at 626 (emphasis added). To enforce forum-selection clauses, the New Jersey Supreme Court held,

> would be to limit severely the availability of *New Jersey courts* as a forum for the enforcement of franchisees' claims under the [FPA], a result that the Legislature assuredly would find intolerable.

Id. at 628 (emphasis added).

Arbitral forum-selection agreements, however, do not raise the ills that the *Kubis* court sought to redress by creating a presumption against litigation forum-selection agreements. If the District of Connecticut were to order arbitration in New Jersey (as petitioner wants) instead of Connecticut (as designated by the parties in their franchise agreement), it would not rectify what the New Jersey legislature "would find intolerable": petitioner would still be denied the right to obtain injunctive and other relief from a New Jersey court. Because the legislative policy that *Kubis* sought to give effect by holding invalid judicial forum-selection clauses does not militate toward holding invalid arbitral forum-selection clauses, there is every reason to assume that the Supreme Court of New Jersey would not, and will not, adopt petitioner's expansion of *Kubis*.[5] Petitioner's injury, therefore, is purely hypothetical, and this case is thus an inappropriate vehicle for addressing the preemption issue that petitioner raises.

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5. What the *Kubis* court found offensive about judicial forum-selection clauses — that such clauses keep New Jersey franchisees out of the New Jersey state courts — may perhaps militate towards the invalidation of arbitration clauses (as opposed to arbitral forum-selection clauses) in New Jersey franchise agreements. However, any such holding by the Supreme Court of New Jersey would clearly be preempted by Section 2 and there is no reason to suppose that the New Jersey Supreme Court will construe its law in a manner that is clearly violative of the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 26 n.11 (1984) (Section 2 preempts state law rule that invalidates arbitration clauses in franchise contracts).

2. *Petitioner's preemption argument ignores the clear and broad language of Section 2.*

Even if petitioner were correct in his interpretation of the *Kubis* rule — and he is not — the Second Circuit correctly held that to the extent that the FPA can be read to invalidate arbitral forum-selection clauses, the law would be preempted. The scope of Section 2 preemption is broad:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2; *see Securities Industry Ass'n v. Connolly*, 883 F.2d 1114, 1118 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) (Section 2 "sweeps broadly and brooks little reservation").[6]

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6. The Supremacy Clause of Article VI of the federal Constitution prevents the states from impinging on federal law and policy. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Preemption — the vehicle by which the Supremacy Clause is generally enforced — always boils down to a matter of congressional intent. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Interpretation of a statute's intent must start with the text itself, *United States v. James*, 478 U.S. 597, 604 (1986), and that language chosen by Congress must be accorded its ordinary meaning, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

As this Court stressed in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989), neither state legislatures nor courts are free to pick and chose which portions of an arbitration agreement to enforce, because "Congress' principal purpose" in passing the FAA was "ensuring that private arbitration agreements are enforced according to their terms." 489 U.S. at 478. No fewer than five times in the last two pages of his *Volt* majority opinion, Chief Justice Rehnquist reiterated that the FAA "requires courts to enforce . . . agreements to arbitrate, like other contracts, in accordance with their terms." *Id. Volt* emphasized that

> [a]rbitration under [the FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract *the rules under which that arbitration will be conducted.*

Id. (emphasis added). The same is true when the contract designates the arbitration site, which then becomes a crucial feature of the arbitration procedure to which the parties have agreed.[7]

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7. That is why federal courts have consistently held that the FAA requires enforcement of arbitral forum-selection clauses, as written. *See, e.g., Roney & Company v. Goren*, 875 F.2d 1218, 1221 (6th Cir. 1989); *Snyder*, 736 F.2d at 419; *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 20 (1st Cir. 1978); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976); *Medika Int'l, Inc. v. Scanlan Int'l, Inc.*, 830 F. Supp. 81, 86 (D.P.R. 1993); *Al-Salamah Arabian Agencies Co., Ltd. v. Reece*, 673 F. Supp. 748, 751 (M.D.N.C. 1987); *Spring Hope Rockwool, Inc. v. Industrial Clean Air, Inc.*, 504 F. Supp. 1385, 1389 (E.D.N.C. 1981); *Haluska v. RAF Financial Corporation*, 875 F. Supp. 825, 828-29 (N.D. Ga. 1994).

Volt did not involve FAA § 4, but the refrain that parties must get the particular type or arbitration called for in their contract is entirely consistent with the plain language of that section, which contemplates a court "order directing that . . . the arbitration proceed *in the manner provided for*" in the arbitration agreement. 9 U.S.C. § 4 (emphasis added). Here, that requires arbitration at the location agreed to by the parties.

To avoid full enforcement of the arbitration agreement in accordance with its terms, petitioner must find refuge in the last clause of FAA § 2, which provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added). However, extending *Kubis* to arbitral forum-selection clauses would not fit within this exception to Section 2's broad policy of enforcing arbitration agreements in accordance with their terms.

As the Supreme Court has repeatedly declared, the FAA preempts all state laws that single out and impermissibly burden arbitration agreements. In *Southland*, 465 U.S. at 11, the Court held that the FAA adopted a "broad principle of enforceability" of arbitration agreements, with the only exceptions those identified in § 2 — grounds for revocation that would apply to "any contract." A footnote in *Perry v. Thomas*, 482 U.S. 483 (1987), made the same point in even stronger language. There, after refusing to consider (because it was not raised below) the appellants' claim that the arbitration agreement was "an unconscionable, unenforceable contract of adhesion," Justice Marshall observed:

> In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law

> envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable and enforceable, *as a matter of federal law, see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2. Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally.

482 U.S. at 492-93 n.9 (emphasis in original).

Similarly, *Volt*, citing *Perry*, declared that "*general* state-law principles of contract interpretation" apply to "the interpretation of an arbitration agreement within the scope of the Act." 489 U.S. at 475 (emphasis added). And in *Casarotto*, the *Perry* footnote became the centerpiece of the Court's analysis of an arbitration agreement virtually identical to the one at issue in this Petition. Justice Ginsberg twice repeated "our observation in *Perry*" that, under the plain language of FAA Section 2, state law "may be applied" to invalidate an arbitration agreement *only if* " 'that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally.' " 517 U.S. at 686-87 (citation omitted). Only "*generally applicable contract defenses*, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* at 687 (emphasis added).

As Judge Meskill recognized, petitioner's interpretation of the New Jersey Franchise Practices Act does not establish a generally applicable contract defense. His view of New Jersey law would restrict enforcement of just one sort of provision —

forum selection provisions — in only one type of contract — a franchise agreement. Under *Casarotto*, *Perry*, *Southland* and *Volt*, such a provision would clearly fall outside the savings clause of FAA § 2. *See Casarotto*, 517 U.S. at 686-88; *Perry*, 482 U.S. at 492-93 n.9; *Volt*, 489 U.S. at 475; *Southland*, 465 U.S. at 11; *see also Management Recruiters International, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997) (if the Washington Franchise Act "imposed an absolute requirement of in-state arbitration notwithstanding the parties' agreement to arbitrate [elsewhere], its validity would be in serious doubt as a result of the preemptive effect of the FAA"); *Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990) (FAA Section 2 preempts state rules of contract formation which single out arbitration clauses); *Connolly*, 883 F.2d 1114 (states cannot circuitously restrict arbitration clauses by imposing penalties on their enforcement in violation of the FAA); *see also* Edward Wood Dunham, *et al.*, *Franchisor Attempts to Control the Dispute Resolution Forum: Why the Federal Arbitration Act Trumps the New Jersey Supreme Court's Decision in Kubis*, 29 RUTGERS L. J. 237 (Winter 1998).

Because the Second Circuit correctly applied well-established principles to the particular facts of this case, there is no reason for this Court to grant *certiorari* to review that decision.

II.

THE SECOND CIRCUIT'S FACT-BOUND DECISION DOES NOT CONFLICT WITH ANY OTHER DECISION AND DOES NOT WARRANT REVIEW

This Court has consistently stated that writs of *certiorari* will not issue "except in cases involving principles the settlement of which is of importance to the public, as

distinguished from [] the parties. . . ." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *see Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). The Court has also repeatedly stated that other than in exceptional circumstances not presented here, it will not review fact-specific determinations by the lower courts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (court will not review evidence or factual findings); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (court will not review findings of fact without exceptional show of error).

Here, the Second Circuit applied well-established legal principles to the unique facts of this case. With respect to petitioner's jurisdiction argument, the Second Circuit found petitioner's argument "without merit" on a straightforward application to the facts of the rule of *Distajo I*, 66 F.3d at 445. *Hamilton*, 150 F.3d at 161. With respect to petitioner's Section 2 preemption argument, the Second Circuit simply applied "the clear language of *Southland* [465 U.S. 1]" to the facts. *Id.* at 163. As shown above, the Second Circuit's decision does not conflict with the decisions of this Court.

More important, petitioner does not even claim that the decision conflicts with decisions of any other court. And for good reason. The Second Circuit's decision on both jurisdiction and preemption is fully in accord with decisions of other federal courts of appeal. *See, e.g., Mason*, 18 F.3d at 1266-67 (jurisdiction); *Fitch*, 966 F.2d at 988 (jurisdiction); *Gibraltar*, 104 F.3d at 618 (jurisdiction); *Bloor*, 129 F.3d at 856 (preemption); *see also* cases in n.7, *supra* (preemption).

The Second Circuit's fact-specific and correctly decided decision has importance only to the parties and does not present any issue of public importance. It does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny petitioner's petition for *certiorari*.

Respectfully submitted,

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